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In The
Supreme Court of the United States
October Term, 1990

UNITED TRANSPORTATION UNION,

Petitioner,

v.

UNITED TRANSPORTATION UNION, LOCAL 74,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Is there a right to a jury trial under the decision in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. ___, 105 L.Ed. 2d 519 (1990) of a local union's claim against its international union alleging that the international union breached its duty of fair representation in negotiations – a duty which has been implied from the Railway Labor Act (45 U.S.C. 151 *et seq.*) – whenever monetary compensation in any form is sought as part of the request for relief.

PARTIES BELOW

The Consolidated Rail Corporation was originally a party to the action in the district court, but was dismissed as a party prior to trial and the appeal below. The parties listed in the caption, United Transportation Union and United Transportation Union, Local 74, are the only current parties.

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No. 90-

In The
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October Term, 1990

UNITED TRANSPORTATION UNION,
Petitioner,
v.

UNITED TRANSPORTATION UNION, LOCAL 74,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioner United Transportation Union ("UTU") respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, after remand from this Court incident to the grant of Petitioner's petition for writ of certiorari in *UTU v. UTU, Local 74*, No. 89-1128.

OPINIONS BELOW

The order of the court of appeals on remand from this Court after the grant of the petition for a writ of

certiorari in *UTU v. UTU, Local 74*, No. 89-1128 is unreported and is reproduced in the Appendix herein ("App.") at 1a-2a. The notice from the Clerk of this Court that the petition for writ of certiorari in No. 89-1128 had been granted, vacating the judgment and remanding the case to the court of appeals for reconsideration in light of *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, 494 U.S. ____ (1990) is included in the Appendix at 3a.

The original opinion of the court of appeals is reported at 881 F.2d 282 and was reproduced in the Appendix in No. 89-1128 ("App. No. 89-1128") at 1a to 21a. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the Northern District of Ohio, Western Division, after trial to the court, dated July 29, 1988, are unreported and were set forth at 24a to 51a of the Appendix in No. 89-1128.

JURISDICTION

The original decision of the court of appeals was filed on July 31, 1989. UTU timely filed a petition for rehearing and hearing en banc on August 11, 1989. On October 16, 1989, that petition was denied. App. No. 89-1128 at 22a-23a. This Court granted UTU's petition for a writ of certiorari March 26, 1990. App. at 3a. The court of appeals issued its order after remand May 7, 1990. App. at 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides as follows:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

A claim against a union for breach of its duty of fair representation ("DFR") is implied from Section 2 Fourth of the Railway Labor Act (45 U.S.C. 152 Fourth), which provides:

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of

any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

STATEMENT OF CASE

United Transportation Union, Local 74 ("Local 74") filed its Complaint in the United States District Court for the Northern District of Ohio, Western Division, on August 4, 1982 naming UTU and the Consolidated Rail Corporation ("Conrail") as defendants.¹ Local 74 alleged a breach of the UTU's duty of fair representation in failing to obtain for its members an equitable allocation of the yard work previously handled in Marion and now claimed to be diverted to other switching facilities on Conrail upon conveyance date of the properties. The action was brought pursuant to the Railway Labor Act, 45 U.S.C. 151, *et seq.* ("RLA"), an act regulating commerce (28 U.S.C. 1337).

On January 30, 1986, the district court granted UTU's motion to strike the jury demand, and the fair representation claim was tried to the court in early February, 1986.

¹ As noted by the court of appeals, Local 74 voluntarily dismissed its claims against Conrail, reflected in an order of the district court dated December 29, 1985. 881 F.2d at 283 n.1, App. No. 89-1128 at 2a n.1.

The court issued its Findings of Fact, Conclusions of Law, and Judgment on July 29, 1988, finding no violation of the fair representation duty, and a failure of Local 74 to exhaust its internal union remedies. App. No. 89-1128 at 24a-51a.

The court of appeals reversed and remanded (Judge Wellford dissenting), holding Local 74 was entitled to a jury trial on its claim against UTU, and that UTU would not have been entitled to a directed verdict on the duty of fair representation and failure to exhaust internal union remedies issues. 881 F.2d 282; App. No. 89-1128 at 1a-21a.

After this Court granted certiorari, vacated the judgment and remanded for reconsideration in light of *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. ____ (1990), the court of appeals issued its order eliminating a reference in its original opinion characterizing back-pay as an equitable claim (App. No. 89-1128 at 10a, 881 F.2d 286-87), but reaffirming its original opinion in all other respects. App. at 1a-2a.

REASONS FOR GRANTING THE WRIT

The minor editorial change made by the court of appeals to its original opinion after this Court granted the petition for a writ of certiorari in *UTU v. UTU, Local 74*, No. 89-1128 and remanded the case for further consideration in light of *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, *supra*,² leaves unresolved a question of

² The order of the court of appeals did not even accomplish its stated intention of eliminating the reference to

exceptional importance that was apparent in the petition in No. 89-1128, to wit, is there entitlement to jury trial in an action for breach of the duty of fair representation for claimed deficiencies in negotiations, as opposed to grievance handling that was the subject of the action in *Terry*, brought against an international union by a local union, *not* the members, whenever monetary relief is part of the relief requested.³ See, Petition in 89-1128 at 5. It is apparent from this Court's decision in *Terry* that the

(Continued from previous page)

backpay relief as being equitable in character. For while the sentence of the original opinion stating that if backpay were the only available monetary relief, the requested relief would possibly be wholly equitable, was eliminated (*compare*, 881 F.2d at 286-87, App. No. 89-1128 at 10a, *with* App. at 1a-2a), left intact was an earlier statement to the same effect ("[I]f a party seeks solely injunctive relief or backpay, the relief sought is equitable and there is no right to trial by jury." (citations omitted). 881 F.2d at 286, App. No. 89-1128 at 9a).

³ The record of the trial before the district court reveals that no evidence quantifying compensatory damages was presented. The legal relief requested in the second amended complaint was compensatory and punitive damages in addition to "an injunction ordering and requiring defendants [Conrail was still a party at that time] to immediately take all reasonable and necessary steps to obtain for plaintiffs [sic] a fair and equitable division of all former EL work which has been diverted since April 1, 1976 to former PC terminals." 881 F.2d at 285, App. No. 89-1128 at 6a-7a. The court of appeals had properly ruled in its original opinion that the request for punitive damages could not support a jury demand since they are not awardable as a matter of law in a duty of fair representation action under this Court's decision in *Int'l. Bhd. of Electrical Workers v. Foust*, 442 U.S. 42 (1979). 881 F.2d at 286, App. No. 89-1128 at 9a-10a.

considerations supporting the holding therein of entitlement to jury trial, are not present in this case.

This is not an action for breach of the duty for failing or refusing to arbitrate an employee's claim against the employer. The employees involved herein did not file any claims with their employer, and they are not even parties to this litigation. Rather, the local union sued the international for having failed to obtain from the employer (Conrail) a seniority system giving employees on their former line a "fair and equitable division" of work done on that line that the local claimed had been diverted by the employer (Conrail) to another line,⁴ and it sought an injunction to obtain such contractual rights. *See*, discussion in n.3. The request for compensatory damages was clearly of the formbook variety as no evidence quantifying such damages was introduced at the trial. *Id.*

The plurality opinion in *Terry, supra*, found the trust analogy to duty of fair representation actions more convincing than the malpractice analogy,⁵ but ultimately

⁴ Actions for claimed breaches of the duty in failing to obtain in negotiations desired provisions or for obtaining provisions (particularly those relating to seniority and work equity) claimed to be harmful to the plaintiffs have long been recognized by this Court. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). This line of cases has been perceived as being distinct from those involving grievance handling insofar as the standard to be applied to determine the actionability of the conduct at issue. *See, Dement v. Richmond, Fredericksburg & Potomac R.R.*, 845 F.2d 451 (4th Cir. 1988); *Schultz v. Owens-Illinois, Inc.*, 696 F.2d 505, 514-15 (7th Cir. 1982).

⁵ The dissent would have found it determinative in rejecting the jury demand. 494 U.S. at ____; 108 L.Ed. 2d at 542-43.

unpersuasive because it found that the nature of the issue to be tried was in part a legal contract claim since breach of the existing agreement by the employer would have to be shown for recovery against the union for breach of the duty of fair representation in grievance handling. 494 U.S. at ____; 108 L.Ed. 2d at 530-31. Finding the historical exegesis which constitutes the first part of the Seventh Amendment analysis in equipoise, the plurality, joined by the two concurring Justices, found the second part of the analysis (nature of the relief requested) determinative in upholding the jury demand. 494 U.S. at ___, 108 L.Ed. 2d at 531-33; 494 U.S. at ____; 108 L.Ed.2d at 533-34 (Brennan, J., concurring); 494 U.S. at ____; 108 L.Ed. 2d at 540 (Stevens, J., concurring).

The only remedy sought in *Terry, supra*, was a request for compensatory damages representing backpay and benefits. 494 U.S. at ___, 108 L.Ed. 2d at 531. Because none of the attributes that must be present to characterize such relief as equitable were found, it was held the backpay was legal in nature. 494 U.S. at ___, 108 L.Ed. 2d at 531-33. Key to this holding was the fact the backpay sought was not money wrongfully withheld by the union, but wages due under an agreement with the employer but for the union's breach of the duty of fair representation. 494 U.S. at ___, 108 L.Ed. 2d at 531.

Here the gist of the action is of an entirely different character. There is no equipoise between the trust and malpractice analogies after applying the first part of the Seventh Amendment analysis because there is no contract claim against the employer present. The heart of the action here is the failure of the union to achieve desired contractual provisions with the employer. Thus, the trust

analogy is unimpaired. The character of the overall action is equitable, not legal.

Moreover, the principal relief sought is injunctive, a requirement that work equity seniority provisions be negotiated with the employer. Compensatory damages, though requested, could not be awarded because they cannot be proven until it is known what agreement will be achieved. An employer cannot breach an agreement that does not exist.

Rather than undertaking the consideration of *Terry, supra*, required in this Court's remand in No. 89-1128, which would have plainly demonstrated the equitable nature of the action and of the relief sought here, the court of appeals merely attempted to correct the portions of its original opinion characterizing backpay as equitable. It is now for this court to decide this question of exceptional importance, i.e., whether under *Terry* duty of fair representation plaintiffs are entitled to a jury in negotiation cases, as opposed to those involving grievance handling.

CONCLUSION

For the foregoing reasons, Petitioner United Transportation Union respectfully asks that the writ be issued as requested herein.

Respectfully submitted,

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*Attorney for Petitioner
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No. 88-3770

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED)	ORDER
TRANSPORTATION	)	(Filed May 7, 1990)
UNION, LOCAL 74,	)	NOT RECOMMENDED
Plaintiff-Appellant,	)	FOR FULL-TEXT
	)	PUBLICATION
v.	)	Sixth Circuit Rule 24 limits
CONSOLIDATED	)	citation to specific situa-
RAIL CORP.,	)	tions. Please see Rule 24
	)	before citing in a proceed-
Defendant,	)	ing in a court in the Sixth
	)	Circuit. If cited, a copy
UNITED	)	must be served on other
TRANSPORTATION	)	parties and the Court.
UNION,	)	<u>This notice is to be promi-</u>
Defendant-Appellee.	)	<u>nantly displayed if this</u>
	)	<u>decision is reproduced.</u>

Before: WELLFORD and GUY, Circuit Judges; and
PECK, Senior Circuit Judge.

The Supreme Court having vacated the judgment entered herein (881 F.2d 262) and having remanded the cause to this court for further consideration in light of *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. ____ (1990), and upon such consideration it having been determined that the following sentence was improvidently included in the opinion and is inconsistent with the opinion of the Supreme Court in *Chauffeurs*: "If back-pay were the only harm for which Local 74 could seek compensation, that prayer would possibly be wholly equitable. See, e.g., *Harris, supra*. But see *Massey v. Whitaker Corp.*, 661 F.Supp. 1151, 1153 (N.D. Ohio 1987) (back-pay, characterized as breach of contract remedy, is legal

remedy absent specific statutory language justifying equitable characterization).", 881 F.2d 286-87,

IT IS ORDERED that said sentence be and it hereby is deleted from the opinion of this court, and that said opinion is in all other respects reaffirmed.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 26, 1990

RECEIVED
MAR 28 1990
LEGAL

Mr. Clinton J. Miller III
United Transportation Union
14600 Detroit Ave.
Cleveland, OH 44107-4250

Re: United Transportation Union
v. United Transportation Union, Local 74
No. 89-1128

Dear Mr. Miller:

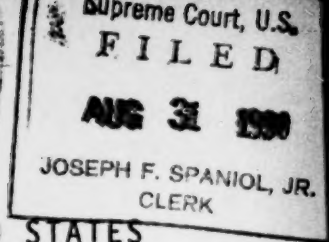
The Court today entered the following order in the
above entitled case:

The petition for a writ of certiorari is granted. The
judgment is vacated and the case is remanded to the
United States Court of Appeals for the Sixth Circuit for
further consideration in light of *Chauffeurs, Teamsters
and Helpers, Local No. 391 v. Terry*, 494 U.S. - (1990).

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
Joseph F. Spaniol, Jr., Clerk

(2)
No. 90-239



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

UNITED TRANSPORTATION UNION,

Petitioner,

v.

UNITED TRANSPORTATION UNION, LOCAL 74,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit**

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I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FULLY CONFORMS WITH THIS COURT'S REASONING AND HOLDING IN <i>CHAUFFEURS, TEAMSTERS AND HELPERS,</i> <i>LOCAL NO. 391 v. TERRY</i> , 494 U.S. _____, 108 L.Ed.2d 519 (1990), AND, THEREFORE, THERE IS NO REASON WHY THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.	8
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-239

UNITED TRANSPORTATION UNION,

Petitioner,

v.

UNITED TRANSPORTATION UNION, LOCAL 74,

Respondent.

BRIEF IN OPPOSITION

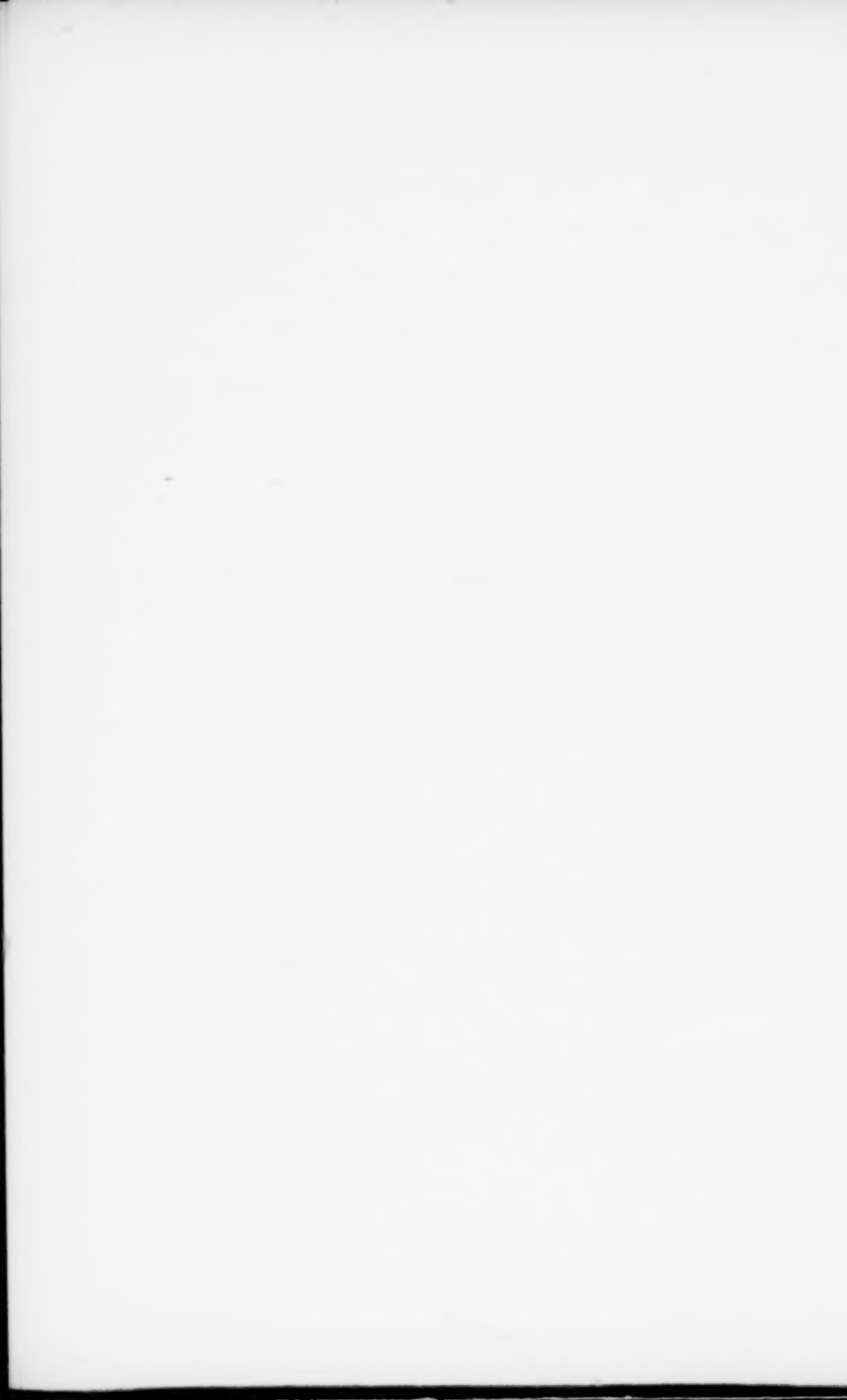
Respondent, United Transportation Union, Local 74, respectfully prays that a writ of certiorari *not* be issued to review the order of the United States Court of Appeals for the Sixth Circuit entered on May 7, 1990.



STATEMENT OF THE CASE

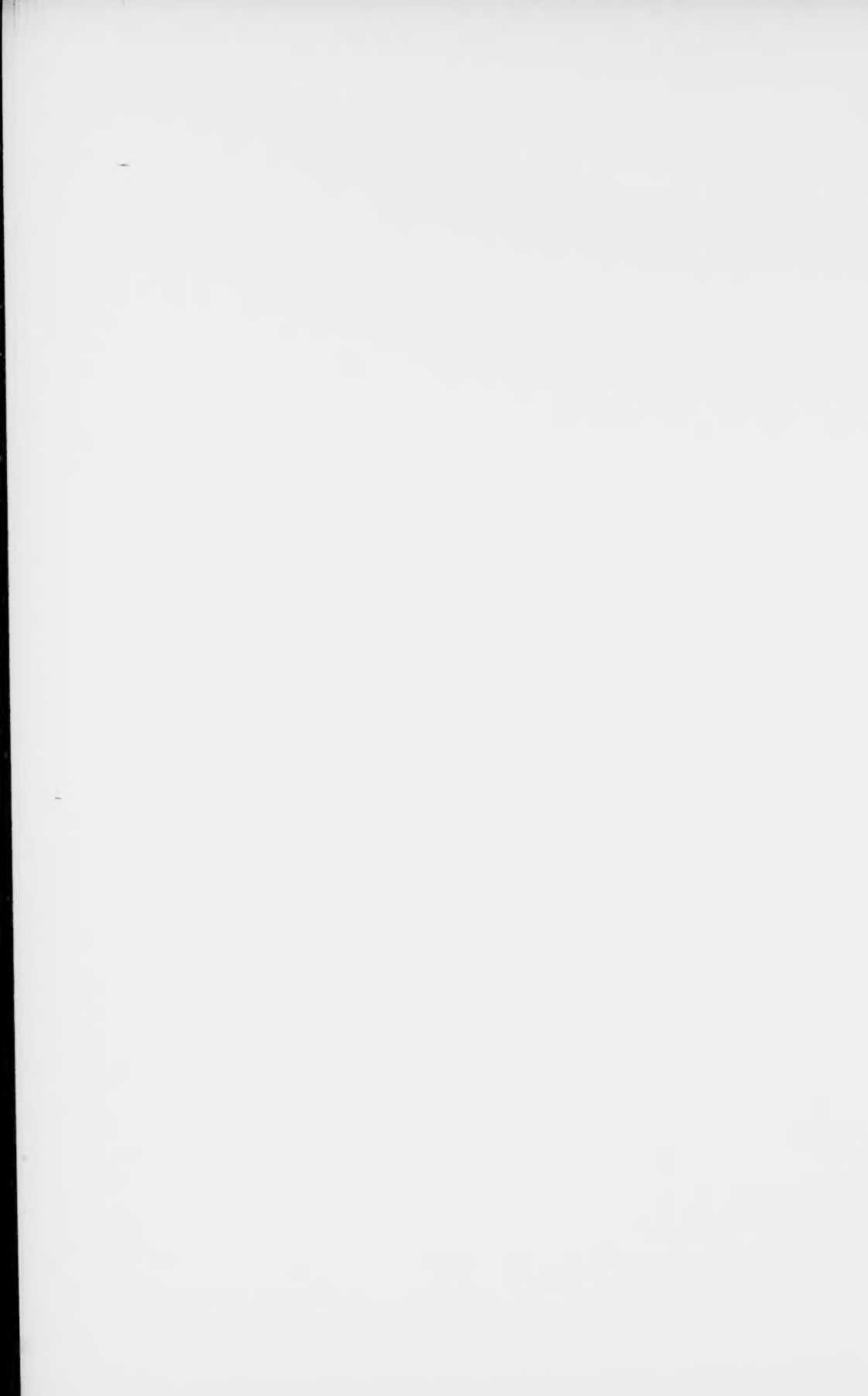
In 1982, United Transportation Union, Local 74 ("Local 74") sued its international union, "UTU," for breach of the union's duty of fair representation. The gist of the complaint was that UTU, arbitrarily and with hostile intent, engaged in a course of conduct designed to deprive the members of Local 74 of a share of yard work in the merged Conrail system as provided for in certain collective bargaining agreements between UTU and Conrail and as provided for in the union constitution.

On January 30, 1986, the District Court granted the union's motion to strike Local 74's jury demand, and the case was tried to the court in February, 1986. On July 29, 1988, the court issued Findings of Fact and Conclusions of Law adverse to Local 74.

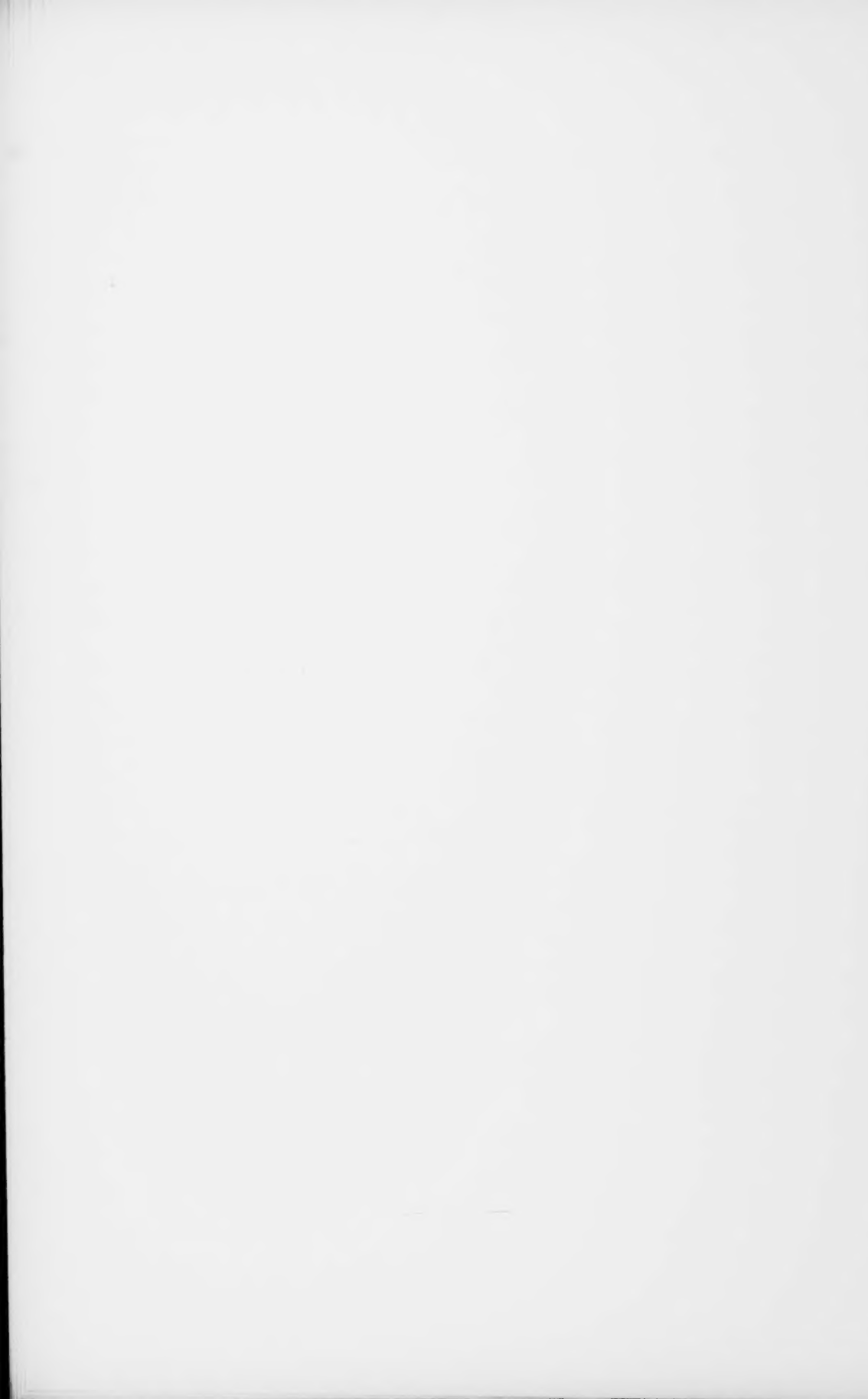


On appeal, the Sixth Circuit Court of Appeals, *inter alia*, found that the character of Local 74's action was legal in nature; that there was sufficient evidence of record to create a submissible case on the issue of whether UTU had breached its duty of fair representation; and that the trial court, therefore, had erred by entering judgment on behalf of UTU. Accordingly, the Circuit Court remanded the case to the District Court for trial by jury.

UTU petitioned this Court for a writ of certiorari and while that petition was pending, this Court decided *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. ____, 108 L.Ed.2d 519 (1990). After it decided *Terry*, this Court granted certiorari in the instant case, vacated the judgment of the court below and remanded the case to the Sixth Circuit



Court of Appeals for reconsideration in light of *Terry*. On May 7, 1990, the Sixth Circuit Court of Appeals entered an order deleting one sentence from the earlier opinion of the court and reaffirming its earlier decision "in all other respects."



SUMMARY OF ARGUMENT

Contrary to Petitioner's assertions, Local 74 did not sue its international union for "having failed to obtain from the employer (Conrail) a seniority system giving employees on their former line a 'fair and equitable division' of work done on that line that the local claimed had been diverted by the employer (Conrail) to another line . . ." (Petitioner's brief at p. 7). As the Court of Appeals found, this is essentially a claim for compensatory damages by the members of Local 74 because their union allegedly refused, arbitrarily and with discriminatory intent, to comply with the terms of certain collective bargaining contracts and with the union constitution which expressly provide that these former employees of the Erie Lackawanna Railroad are entitled to a "fair and equitable division of the work" in the

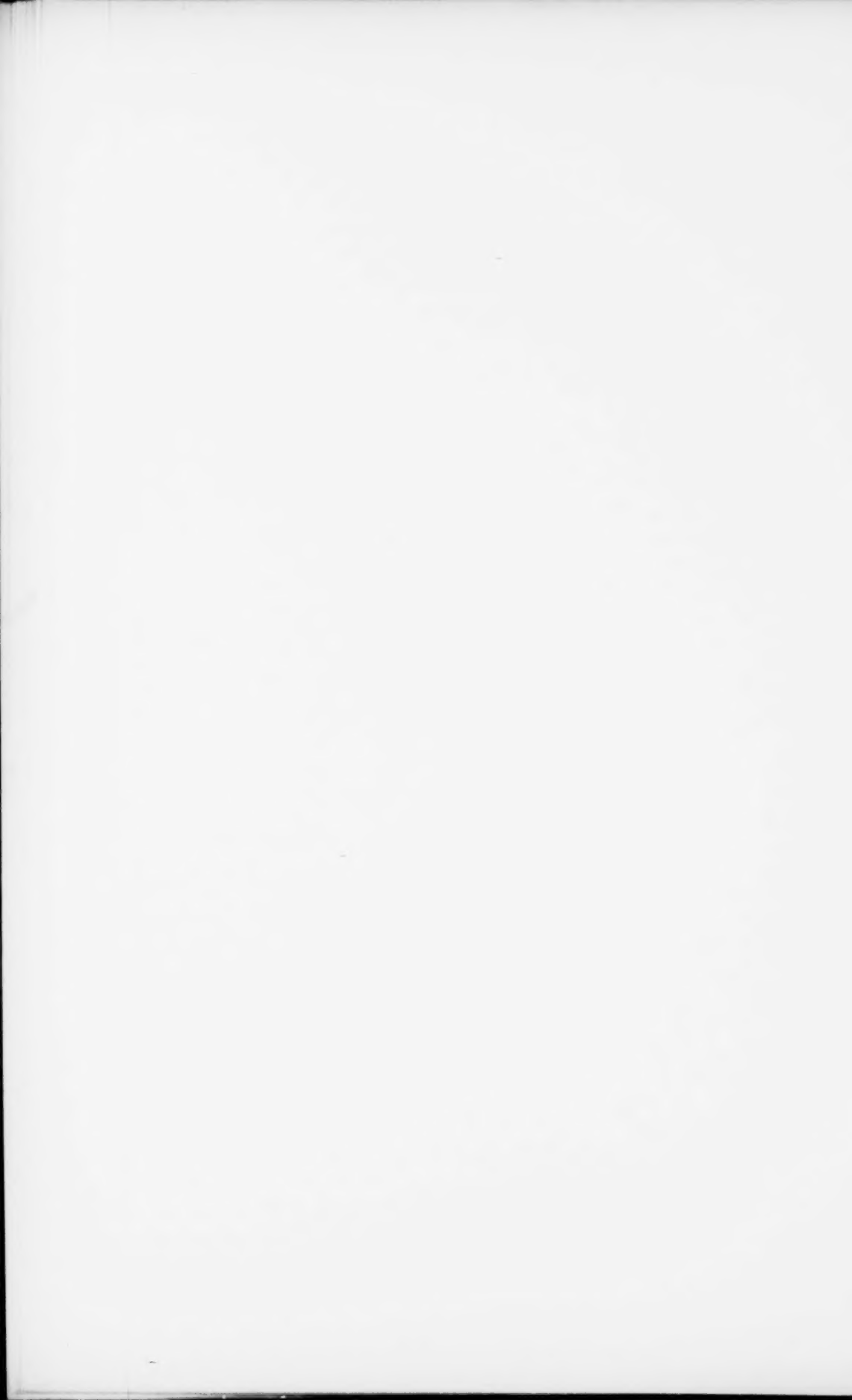


merged railroad system. The Court of Appeals found that the remedy sought by Local 74 in this action is legal in nature and, therefore, Local 74 is entitled to trial by jury. On remand, the Court of Appeals, as directed by this Court, reviewed its initial decision in light of this Court's ruling in *Terry*, deleted one sentence from its original opinion and, in all other respects, reaffirmed that decision.

The Court of Appeals' decision is wholly in conformity with this Court's decision in *Terry*. By amending its decision to clearly reflect that back pay relief in the context of this action should be characterized as a breach of contract remedy and, therefore, legal in nature, the Court of Appeals simply removed an ambiguity in its original decision so as to make that decision conform even more



clearly with this Court's opinion in *Terry*. Since the Court of Appeals fully complied with this Court's directions on remand to consider its original decision in light of *Terry*, there is no basis to review this case.



REASONS WHY THE WRIT SHOULD
NOT BE GRANTED

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FULLY CONFORMS WITH THIS COURT'S REASONING AND HOLDING IN *CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL NO. 391 v. TERRY*, 494 U.S. ___, 108 L.Ed.2d 519 (1990), AND, THEREFORE, THERE IS NO REASON WHY THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

In *Terry*, this Court found that a claim by union members against their union for compensatory damages representing back pay and lost benefits was for relief of a kind that was legal in nature and, therefore, there was a right to a jury trial under the Seventh Amendment to the United States Constitution. In the instant case, as did this Court in *Terry*, the Court of Appeals found that the nature of the remedy sought by Local 74, namely, back pay and other compensatory damages, is legal in nature and, using substantially the same reasoning this Court used in *Terry*, arrived



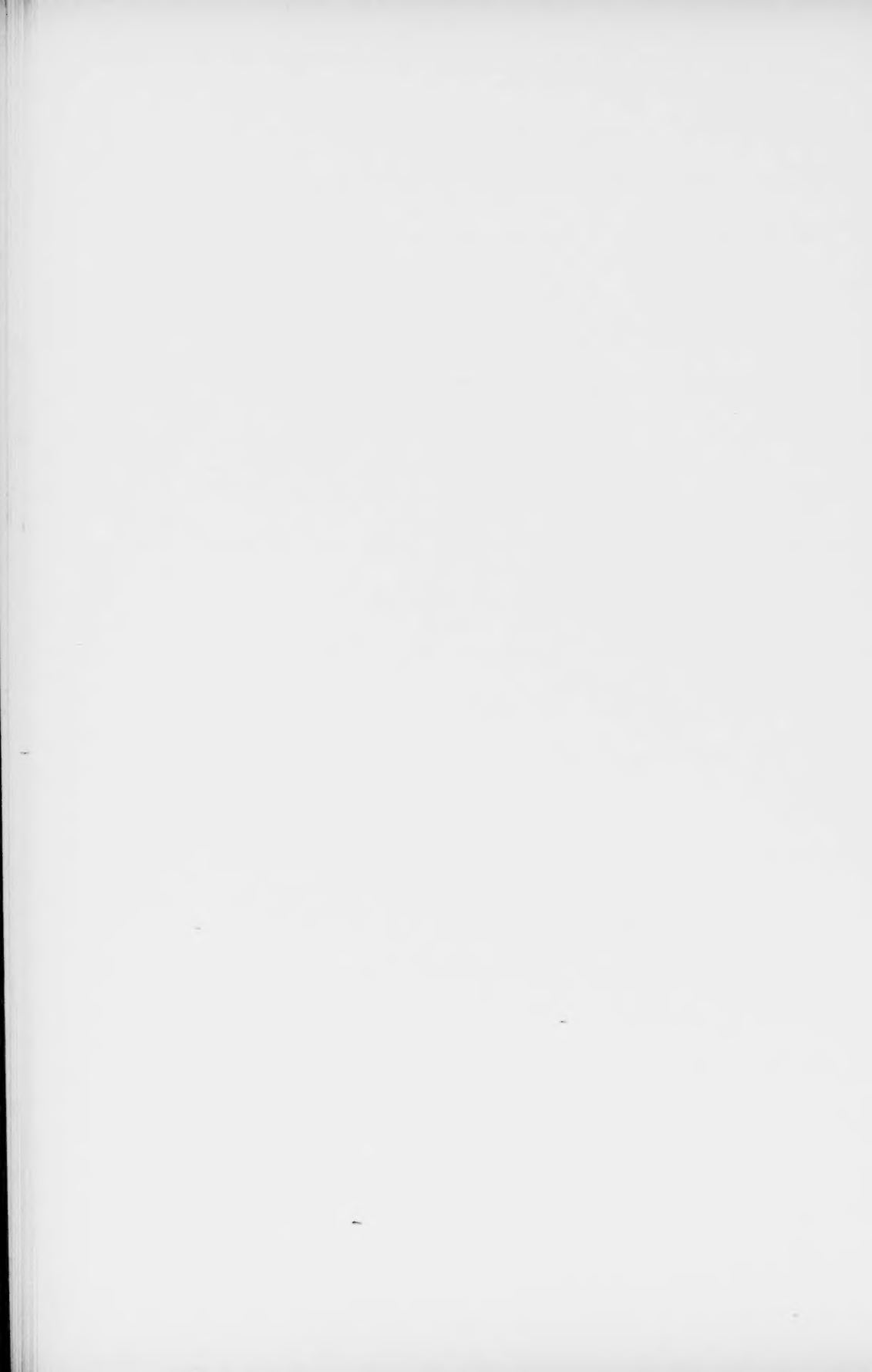
at the same conclusion as regards Local 74's right to a jury trial. By deleting one sentence in the original opinion suggesting that back pay may be a "wholly equitable" remedy, the Court of Appeals simply removed an ambiguity which served to make its original opinion conform even more fully with this Court's ruling in *Terry*.

Petitioner attempts to reconstruct the record by gratuitously transforming Local 74's action into a "negotiation case." It argues that what Local 74 is essentially seeking is an order requiring the union to negotiate for them a fair share of work in the merged system and, therefore, this action should be deemed as one which is essentially equitable in nature thereby rendering the Court of Appeals' decision inconsistent with this Court's holding in *Terry*. Aside from the fact that, as the Court of Appeals found, this argument



cannot be sustained from the record, it is illogical and unsupportable on its face.

The merger in question occurred in 1976. The employees of Local 74 tried for six years to obtain what their collective bargaining contracts and union constitution expressly said they were entitled to, namely, a fair share of work in the merged system. As the record shows, many of these men were either forced out of the railroad industry because of lack of work or, since 1976, have reached retirement age. It is clear on the face of it that any kind of equitable relief would be all but meaningless to most of the members of Local 74 and that the only meaningful remedy to them would be the compensatory damages which they seek. The facts of this case and the nature of the remedy sought by Local 74 clearly show that, consistent with this Court's reasoning in *Terry*, the Court



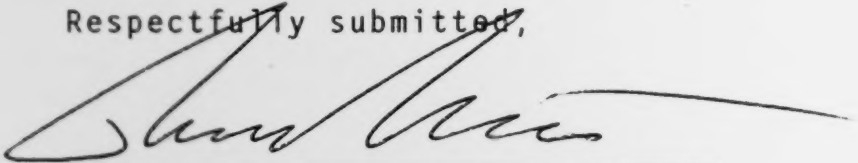
of Appeals was correct in concluding that the members of Local 74 are entitled to trial by jury.



CONCLUSION

This Court should deny the Petition for Writ of Certiorari because the decision of the United States Court of Appeals for the Sixth Circuit fully complies with this Court's order of remand and with the holding and reasoning of this Court in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, supra*.

Respectfully submitted,



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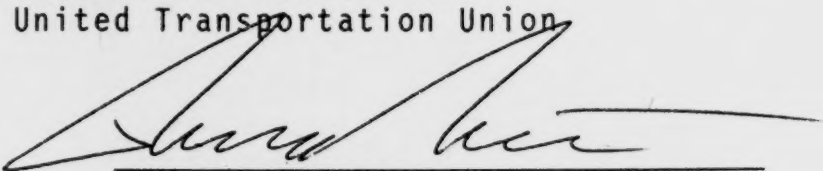


CERTIFICATION

This is to certify that three copies of the foregoing Respondent's Brief in Opposition were served on August 30, 1990 by First Class U.S. Mail, postage prepaid, upon the following counsel of record:

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